85-1789

Supreme Court, U.S.
FILED
DEC 31 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1985

AMERICAN VELODUR METAL, INC.,
PETITIONER,

v.

NORMA SCHINABECK,
RESPONDENT.

Petition for a Writ of Certiorari.

BRIAN E. CONCANNON,
CONCANNON, KUDZMA & LAVAN,
475 Furnace Street,
Marshfield, Massachusetts 02050-2394.
(617) 837-2197
Attorney for Petitioner

On the brief:
DANIEL E. KUDZMA

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

40 pp

Question Presented for Review.

What steps must be followed by a trial court before imposing litigation-ending sanctions under Rule 37 of the Rules of Civil Procedure for failure to provide discovery in order to insure that the sanctions are just and to insure that the right to due process of law has been afforded to the party against whom the sanctions are imposed, where the failure to produce a witness for deposition was without willfulness and where there was a good faith attempt to produce a non-party for deposition?

Table of Contents.

Opinion below	1
Jurisdiction	2
Statutes involved	2
Statement of the case	7
Statement of the facts	8
Reasons for granting the writ	9
Conclusion	19
Appendix	follows p. 19

Table of Authorities Cited.

CASES.

American Velodur Metal, Inc. v. Schinabeck, 20 Mass. App. Ct. 460 (1985)	1, 11
Bon Air Hotel, Inc. v. Time, Inc., 376 F.2d 118 (5th Cir. 1967)	16, 17
Edgar v. Slaughter, 548 F.2d 770 (8th Cir. 1977)	16
Flaska v. Little River Marine Const. Co., 389 F.2d 885 (5th Cir. 1968)	17
Gill v. Stolow, 240 F.2d 669 (2d Cir. 1957)	18
Hammond Packing Company v. Arkansas, 212 U.S. 322 (1909)	12
Hovey v. Elliott, 167 U.S. 409 (1897)	12
In Matter of Dolleslager, 618 F.2d 322 (5th Cir. 1980)	17
Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982)	11, 15, 17
McCargo v. Hedrick, 545 F.2d 393 (4th Cir. 1976)	17

National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639 (1976) 13, 14

Schenck v. Bear, Stearns & Co., Inc., 583 F.2d 58 (2d Cir. 1978) 17

Societe Internationale v. Rogers, 357 U.S. 197 (1948) 12, 13, 17

Tolbert v. Leighton, 623 F.2d 585 (9th Cir. 1980) 17

Wilson v. Volkswagen of America, Inc., 561 F.2d 494 (4th Cir. 1977) 17

STATUTES.

United States Constitution
Amendment 5 2
Amendment 14 2

28 U.S.C. § 1257(3) 2

Federal Rules of Civil Procedure
Rule 26 (d)(2) 16

Massachusetts Rules of Civil Procedure
Rule 37 3, 10, 13, 14, 15 et seq.

MISCELLANEOUS.

Werner, Survey of Discovery Sanctions, 1979 Ariz. St.L.J. 299 14n

No. - .

In the
Supreme Court of the United States.

OCTOBER TERM, 1985

AMERICAN VELODUR METAL, INC.,
PETITIONER,

v.

NORMA SCHINABECK,
RESPONDENT.

Petition For A Writ of Certiorari.

Opinion Below.

American Velodur Metal, Inc., the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Appeals Court of the Commonwealth of Massachusetts entered in the above-entitled case on October 2, 1985.

The opinion of the Appeals Court of Massachusetts reported at 20 Mass. App. Ct. 460, is printed in the Appendix hereto, *infra*, at page 3a. The decision and order of the Superior Court Department of the Trial Court, Plymouth Division, is printed in

Appendix hereto, *infra*, at page 1a. The Journal Entry of Judgment of the Superior Court Department of the Trial Court, Plymouth Division, is printed in Appendix hereto, *infra*, at page 2a.

Jurisdiction.

The jurisdiction of this court to review this case on certiorari rests on 28 U.S.C. § 1257(3).

Statutes Involved.

CONSTITUTION OF THE UNITED STATES OF AMERICA.

Amendment 5.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 14.

SECTION 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United

States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MASSACHUSETTS RULES OF CIVIL PROCEDURE.

Rule 37.
(As it was in effect on December 31, 1983)

FAILURE TO MAKE DISCOVERY: SANCTIONS.

(a) Motion for Order Compelling Discovery. Upon reasonable notice to other parties and all persons affected thereby, a party may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or on matters relating to a deposition, to the court in the county where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the county where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer or a designation or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may

complete or adjourn the examination before he applies for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer*. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion*. If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply with Order.

(1) *Sanctions by Court in County Where Deposition is Taken*. If a deponent wilfully fails to be sworn or to answer a question after being directed to do so by the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action is Pending*. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on

behalf of a party wilfully fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the wilful failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has wilfully failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court may require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any documents or the truth of any matters as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order

requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable grounds to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or a managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party wilfully fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court may require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Expenses Against Commonwealth. Except to the extent permitted by statute, expenses and fees may not be awarded against the Commonwealth under this rule.

Statement of the Case.

This was an action seeking injunctive relief brought by the petitioner in the Superior Court Department of the Trial Court, Plymouth Division, to recover possession of real estate. The respondent filed counterclaims alleging abuse of process by petitioner in bringing its complaint and fraudulent conveyance of the subject real estate to the petitioner by Rainer Schinabeck, the estranged husband of the respondent. When petitioner was unable to produce Rainer Schinabeck for deposition, the superior court imposed upon the petitioner sanctions for failure to provide discovery. These included the deemed admission of the respondent's counterclaims, the dismissal of petitioner's complaint, and the order that the real estate be reconveyed to respondent without compensation to the petitioner.

On January 17, 1984, after trial by jury on the issue of damages for abuse of process, judgment was entered for respondent in the amount of $285,000.00. Petitioner's motions for a new trial and judgment notwithstanding the verdict were denied.

The petitioner's petition for direct appellate review to the Supreme Judicial Court of Massachusetts was denied and it appealed to the Appeals Court for the Commonwealth of Massachusetts.

By opinion dated July 29, 1985, a copy of which is attached hereto, the Appeals Court affirmed the judgment of the trial court.

The petitioner applied for further appellate review to the Supreme Judicial Court of Massachusetts on August 23, 1985; on October 2, 1985, the application was denied.

Statement of the Facts.

The petitioner, American Velodur Metal, Inc.. (A.V.M. herein) filed a complaint on July 15, 1982, to obtain possession of property leased by the corporation and occupied by the defendant.

The defendant filed counterclaims alleging abuse of process, claiming that her husband was an agent, officer, or employee of A.V.M. and that he was the motivating force behind the complaint, whereby he sought to compel a favorable settlement in a divorce action brought by the defendant against him in Switzerland. A.V.M. consistently denied any connection between it and the defendant's husband, Rainer Schinabeck.

On September 2, 1982, the defendant filed a notice to depose A.V.M. through Rainer Schinabeck. A.V.M. did not produce him, asserting that he was neither an agent, officer, or employee, had not been served with process, and was not a party to the action. Throughout the pretrial proceedings, A.V.M. cooperated fully with the defendant's numerous other requests for discovery and made good faith efforts to obtain the presence of Rainer Schinabeck.

On January 24, 1983, A.V.M. moved to strike the pleading of the defendant. The motion was allowed. The defendant amended her answer and counterclaim by a document filed on February 4, 1983. On February 17, the defendant moved for the sanction of dismissal for the failure of the plaintiff to produce Rainer Schinabeck for deposition on December 17. On April 20, 1983, the court granted defendant's motion that the counterclaims be deemed admitted, that the complaint be dismissed and that the property reconveyed unless Rainer Schinabeck were made available for deposition within sixty days.

On June 23, 1983, A.V.M. offered to produce Rainer Schinabeck for deposition on July 11 in Switzerland and to pay the

travel expenses of the defendant's attorney and a stenographer. The trial judge refused to reconsider the conditional order entered on April 20 by the previous judge. No evidentiary hearing was held on the alleged connection between A.V.M. and the prospective deponent or on the reasons for the petitioner's inability to comply with the court's order. With the case not yet a year old, the court denied the motion of A.V.M. and entered an order for sanctions, barring the plaintiff from prosecuting its claim, and deeming admitted the defendant's counterclaims.

The sole remaining issue was that of damages for abuse of process. That issue was tried before a jury, which reached a verdict for the defendant in the amount of $285,000.00 with interest from the date of commencement of the original action.

In appealing the judgment to the Appeals Court of Massachusetts, A.V.M. argued, inter alia, that the trial court's imposition of sanctions was an abuse of its discretion and so unjust as to deprive A.V.M. of its right to due process under the state and federal constitutions. The Appeals Court affirmed the judgment of the trial court and directed entry of judgment for $285,000.00, with interest, and reconveyance of the real estate earlier purchased by the petitioner for $150,000.00; no compensation was ordered for the reconveyance.

Reasons for Granting the Writ.

The decision of the Massachusetts Appeals Court has raised important questions as to the application of the provisions of the Massachusetts Rules of Civil Procedure relating to due process of law in denying a party to a lawsuit the right to prosecute its claim and defend counterclaims against it on the basis of a discovery order requiring it to produce for deposition an individual who was not a party to the action.

In this case the appellate court let stand an order of the trial court imposing the most severe of all possible sanctions despite the court's flagrant abuse of its discretion to impose sanctions under Rule 37.

When the sanctions were imposed the case was still young; in a court where civil actions do not reach trial for three or more years, it was barely eleven months from the filing of the original complaint and four months after the filing of an amended answer and counterclaims that the order deeming admitted the defendant's counterclaims was issued. The corporate plaintiff had cooperated with the respondent's numerous requests for discovery and had provided its own officer and employees for deposition. Despite its conviction that the individual to be deposed was neither a party nor an officer, director, or agent of the corporation, the petitioner made good faith efforts to secure his presence in Massachusetts and, failing in those efforts, offered to make him available for deposition at his residence in Switzerland and to pay the expenses of defense counsel and a stenographer.

Instead, the court imposed sanctions foreclosing the petitioner from proving its own claim and defending the counterclaims of the respondent. There was no evidentiary hearing conducted to determine the truth of the respondent's allegation that the person sought for deposition was an officer, director or managing agent of the plaintiff corporation or to determine whether the petitioner's failure was willful or due to an inability to comply with the court's order despite good faith efforts to do so.

The damages to the petitioner as a result of the sanctions were enormous. Not only was it precluded from proving its own claim, but it was deprived without compensation of real estate which it had purchased for $150,000 and was assessed $285,000 with interest in a jury verdict on the respondent's counterclaim.

Citing this court's holding in *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707-708 (1982), the appeals court acknowledged "that the failure to provide discovery must take place 'wilfully' and that any sanction for the violation of the rule be 'just'." *American Velodur Metal, Inc.* v. *Schinabeck*, 20 Mass. App. Ct. 460, 466 (1985). Nonetheless, an analysis of the facts and procedural history of the case not only belies the court's assertion that the sanctions were just, but demonstrates a facile interpretation and mechanistic application of the decisions of the Supreme Court as well as a disregard of the petitioner's right to due process of law.

Insurance Corp. of Ireland, Ltd. v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), recognized that the court's discretion in imposing Rule 37 sanctions is limited by due process considerations:

> Rule 37(b)(2) contains two standards — one general and one specific — that limit a district court's discretion. First, any sanction must be "just"; second, the sanction must be specifically related to the particular "claim" which was at issue in the order to provide discovery. While the latter requirement reflects the rule of Hammond Packing, supra, the former represents the general due process restrictions on the court's discretion.

Id. at 707.

Aside from the Court's analysis of the facts before it in that case, no specific guidelines were established to assist trial courts and the bar in assessing whether drastic sanctions in another factual context would be "just", so as to preserve a litigant's right to due process.

Earlier Supreme Court decisions on the issue provide limited assistance. In *Hovey* v. *Elliott*, 167 U.S. 409 (1897), Justice White concluded that a denial of the right to defend and the rendering of a decree without a hearing as punishment for a refusal to obey a court order is a denial of due process of law.

Justice White again considered the issue in 1909 in the case of *Hammond Packing Company* v. *Arkansas*, 212 U.S. 322 (1909) and this time found that due process was preserved "by the presumption that the refusal to produce evidence material to the administration of due process was but a want of merit in the asserted defense." *Id.* at 350-351.

Nearly fifty years later, the Court explained the two earlier decisions by saying that the holding in the *Hammond Packing* case had "substantially modified" that of *Hovey* v. *Elliott*. In *Societe Internationale* v. *Rogers*, 357 U.S. 197, 209 (1948), the Court also observed, however, that,

> These two decisions leave open the question of whether Fifth Amendment due process is violated by the striking of a complaint because of a plaintiff's inability, despite good-faith efforts, to comply with a pretrial production order. The presumption utilized by the Court in the Hammond Case might well falter under such circumstances. [citation omitted] *Certainly substantial constitutional questions are provoked by such action.*

Id. at 210 (Emphasis added.)

The Court concluded that,

> In view of the findings in this case, the position in which petitioner stands in this litigation, and the serious constitutional questions we have noted, we

> think that Rule 37 should not be construed to authorize dismissal of this complaint because of petitioner's noncompliance with a pretrial production order where it has been established that failure to comply has been due to inability, and not to willfulness, bad faith, or any fault of petitioner.

Id. at 212.

National Hockey League v. *Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976), was the first case in the wake of the 1970 amendments to Rule 37 which deleted references to "willfulness" and "refusal" to make discovery as prerequisites to invoking sanctions under the rule. In that case the Court endorsed the dismissal of the plaintiff's complaint for failure to answer interrogatories, stating,

> The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing.

Id. at 642.

The language of the *National Hockey League* case commonly cited by appellate courts in affirming orders imposing litigation-ending sanctions is the approval of the deterrent value of such penalties:*

---

* One study noted that:

> In the sixteen months after the Supreme Court handed down its decision [in the *National Hockey League* case], the circuit courts continued to reverse about fifty percent of all dismissals and default judgments entered under rule 37. Those courts reversing these sanctions continued to cite Societe Internationale and found no

> But, here, as in other areas of the law, the most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.

Id. at 643.

While the facts of the case before the Court in *National Hockey League* were deemed to have demonstrated sufficient "flagrant bad faith" (*Id.* at 643), future litigants were left without guidelines as to what safeguards to due process a court should be expected to observe when contemplating the imposition of drastic sanctions under Rule 37. In this respect, at least, the case may have done less to encourage good-faith compliance with discovery requests than to discourage disobedience of discovery orders. The refusal to reverse an order imposing litigation-ending sanctions for less than a flagrant abuse of discretion by the trial judge assumes that lesser abuses of discretion cannot violate a litigant's right to due process of law.

It is clearly in the best interest of the administration of justice and the efficient operation of the courts which have adopted the Federal Rules of Civil Procedure to be given more explicit guidelines in the proper application of Rule 37 sanctions, particularly in cases where those sanctions will result in a denial

---

> willfulness on the record. Those courts upholding dismissals and default judgments cited National Hockey League on the need for the federal courts to effectuate the policy of deterrence underlying rule 37.

Werner, Survey of Discovery Sanctions, 1979 Ariz. St.L.J. 299, 319.

of a litigant's opportunity to be heard. The large number of cases revealed by even a cursory study of the problem of discovery sanctions suggests that courts may be spending a disproportionate amount of their valuable time in attempting to settle pretrial discovery disputes. The worthy goal of the broadened philosophy of discovery embodied by the Rules may better be served by providing a framework within which discovery can take place in order to narrow issues for trial with less court involvement in pretrial discovery. Moreover, uniformity of the application of the Rules is mandated in instances where a litigant's constitutional rights will be foreclosed.

The inequitable result in the case at bar epitomizes the need for more explicit guidelines from this Court. The sanctions imposed by the trial court were neither "just," as required by Rule 37 and the holding of the Supreme Court in the *Insurance Corp. of Ireland* case, *supra*, nor was it in conformity with the holdings of the circuit courts of appeal.

In affirming the severe sanctions the Appeals Court failed to address harmful errors committed by the lower court. It ignored the petitioner's argument that the trial court first abused its discretion by not conducting an evidentiary hearing to determine whether the proposed deponent was in fact, as the defendant had contended, an agent of the corporation. Clearly, without such a determination there would be no basis in the law for either the court's order or the invocation of sanctions. The impropriety of sanctions under such facts is implicit in Rule 37 and was cogently summarized by the Court of Appeals for the Fifth Circuit:

> The dismissal was predicated on the legal assumption that [the former president of the plaintiff corporation] was an officer of the corporation within the meaning of Rule 37(d). The facts and the law cast strong doubt

> on the correctness of that premise. The test is not what a person has been in relation to a corporation but what he was "at the time of the taking of the deposition."

Bon Air Hotel, Inc. v. *Time, Inc.*, 376 F.2d 118, 121 (5th Cir. 1967) (citing language of Rule 26(d)(2), Federal Rules of Civil Procedure) (footnote omitted).

The error committed by the court's failure properly to make this preliminary determination was compounded when it failed to conduct an evidentiary hearing as to the reasons for the petitioner's inability to comply at the expiration of the sixty days of the conditional order for sanctions. In *Edgar* v. *Slaughter*, 548 F.2d 770 (8th Cir. 1977), the court stressed that dismissal and entry of default judgment should be the rare judicial act, and that "fundamental fairness" directs the court to hold a hearing to determine a just sanction. *Id.* at 773.

In this case, the corporate plaintiff asked for a continuance within the sixty days within which it was ordered to produce a foreign national then in Europe and with business interests worldwide. The request was not unreasonable in light of the fact that the case was less than one year old and the amended answer and counterclaims had been filed during the previous four months. Prior to the entry of the preclusion order, the petitioner offered to provide the requested individual for deposition in Switzerland and to pay the expenses of the defendant's attorney and a stenographer. In denying the request, the judge refused to reconsider the previous judge's conditional order of sanctions in the mistaken belief that he was not so empowered.

The denial of the request for reconsideration prevented the petitioner from introducing evidence in mitigation of the court's self-executing sanctions. For example, the contention that the deponent designated by the respondent was neither a party,

officer, director or managing agent made the case one of inability to comply with a discovery order rather than refusal to comply, placing the case squarely within the law of *Societe Internationale* v. *Rogers*, 357 U.S. 197 (1978). Secondly, the petitioner was prevented from showing that its failure to comply was not due to willfulness, bad faith, or fault (see *id.* at 212); that, in fact, it had made good faith efforts to procure the non-party (*id.* at 208; see also *Bon Air Hotel, Inc.* v. *Time, Inc., supra*, 376 F.2d at 122); that the short time the case had been before the court did not warrant the use of drastic sanctions (see, for example, *Tolbert* v. *Leighton*, 623 F.2d 585 (9th Cir. 1980); *Flaksa* v. *Little River Marine Const. Co.*, 389 F.2d 885 (5th Cir. 1968); *Schenck* v. *Bear, Stearns & Co., Inc.*, 583 F.2d 58 (2d Cir. 1978); that if any sanctions were to be imposed, then less drastic ones were in order; (see *Wilson* v. *Volkswagen of America, Inc.*, 561 F.2d 494, 504 (4th Cir. 1977), and *In Matter of Dolleslager*, 618 F.2d 322, 324 (5th Cir. 1980); and most importantly, that the sanctions of the conditional order were not, under the circumstances of this case, "just" (*Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee, supra*, 456 U.S. at 707).

In summary, despite the frequency with which the issue of the propriety of sanctions under Rule 37 arises in the trial and appellate courts, the law remains unclear as to when a court is empowered to exercise its discretion to terminate litigation for a failure to provide discovery without offense to a litigant's constitutional right to due process of law. Circuit courts of appeal have required that in these circumstances fundamental fairness requires a hearing to show cause why such sanctions ought not to be imposed. One court has defined a test to be applied to determine whether the order of dismissal is proper (see *McCargo* v. *Hedrick*, 545 F.2d 393, 396 (4th Cir. 1976). The Supreme Court has yet to hand down explicit guidelines which would enable trial courts to invoke "just" sanctions,

guide appellate courts in their review of the trial court's exercise of discretion, enlighten the bar attempting to meet discovery obligations without court intervention, and provide a needed uniformity in the interpretation of the rule.

> [A] court has the responsibility to do justice between man and man; and general principles cannot justify denial of a party's fair day in court except upon a showing of willful default.

Gill v. *Stolow*, 240 F.2d 669, 670 (2d Cir. 1957).

The case at bar presents this Court with the opportunity to provide guidance to the courts and the bar in dealing with these issues. The case was in its early stages when the sanctions were imposed; the petitioner consistently made good faith efforts to comply with all discovery requests; the failure to provide discovery was that of a non-party; the petitioner was subjected to extreme sanctions without an opportunity to be heard; less severe sanctions were not explored; the harm to the petitioner was enormous.

Conclusion.

For the foregoing reasons, American Velodur Metal, Inc., the petitioner, prays that this petition for a writ of certiorari should be granted.

Respectfully submitted,

BRIAN E. CONCANNON,
CONCANNON, KUDZMA & LAVAN,
475 Furnace Street,
Marshfield, Massachusetts 02050-2394.
(617) 837-2197
Attorney for Petitioner

On the brief:
DANIEL E. KUDZMA

Table of Contents.

Order of the Trial Court, dated June 30, 1983	1a
Judgment	2a
Decision of Massachusetts Appeals Court, dated July 29, 1985	3a

Appendix.

ORDER OF THE TRIAL COURT

ALL COMMUNICATIONS SHOULD BE ADDRESSED TO THE CLERK

Commonwealth of Massachusetts
County of Plymouth
Office of Clerk of the Courts
Plymouth 02360

FRANCIS R. POWERS
CLERK

PLYMOUTH, SS SUPERIOR COURT DEPARTMENT
OF THE TRIAL COURT OF THE COMMONWEALTH
No. CA82-15408 June 30, 1983

AMERICAN VELODUR METAL, INC.
Plaintiff(s)
VS.
NORMA SCHINABECK
Defendant(s)

In the above-named action motion or Rainer Schinabeck to continue deposition in Zuq, Switaerland [sic] denied (see transcript of hearing on motion); defendant's motion to continue hearing of motion to continue deposition (see previous motion); defendant's motion for judgment on pleadings and judgment on first and second counterclaims — first and second counterclaims deemed admitted by order of Judge Hurd of April 20, 1983, Rainer Schinabeck having failed to appear for deposition on June 20, 1983, case placed on October jury list (Travers, Jr., J.)

/s/Francis R. Powers
Clerk.

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, ss

SUPERIOR COURT DEPARTMENT OF THE
TRIAL COURT OF THE COMMONWEALTH

CA82-15408

AMERICAN VELODUR METAL, INC.

VS.

NORMA SCHINABECK

JUDGMENT FOR DEFENDANT AS TO DAMAGES
AFTER RESCRIPT

This action was appealed to the Appeals Court, the issues having been duly heard and the Appeals Court having duly issued a rescript affirming the judgment as to damages, it is

ORDERED and ADJUDGED that judgment for the defendant Norma Schinabeck is entered in the sum of $285,000.00 with interest thereon from July 15, 1982, as provided by law, and her costs of action.

Dated at Plymouth, Massachusetts, this fifteenth day of October, 1985.

/s/_____
Assistant Clerk

AMERICAN VELODUR METAL, INC. *vs.* NORMA SCHINABECK.

Plymouth. May 6, 1985. — July 29, 1985.

Present: GRANT, CUTTER, & PERRETTA, JJ.

Practice, Civil, Discovery, Sanctions. *Evidence*, Expert opinion, Hearsay, Business records. *Abuse of Process*. *Damages*, Counsel fees, Abuse of process.

In an action by a corporation controlled by the husband of the defendant, seeking to enjoin the defendant wife from occupying a former marital residence to which the corporation claimed exclusive possession under a conveyance initiated by the husband, it could reasonably be concluded that the husband's prolonged course of obstructive tactics in making himself unavailable for deposition clearly demonstrated his wilfulness and bad faith, and a judge acted properly within his discretion in ordering that the wife's counterclaims against the corporation, alleging fraudulent conveyance of the residence and abuse of process, "[be] deemed admitted." [ ]

As part of the proof on the issue of damages at the trial of a counterclaim for abuse of process, a judge, in the circumstances, acted properly within his discretion in admitting in evidence a computer printout of billing records found by him to have been made in good faith and in the regular course of a law firm's practice of law, even though the material had been prepared, at least in part, after the filing of the complaint and thus did not strictly fulfil the requirement of G. L. c. 233, § 78. [ ]

A wife's counterclaim against a corporation controlled by her husband adequately alleged that the corporation had abused legal process by commencing an action against her for the ulterior purpose of coercing a settlement in a divorce proceeding. [ ]

At the trial of a claim for abuse of process, there was sufficient evidence of damages resulting from mental suffering, harassment, inconvenience, counsel fees, and loss of time to warrant the judge, in his discretion, in denying motions for judgment n.o.v. and for a new trial, based on the contention that the damages were excessive. [ ]

CIVIL ACTION commenced in the Superior Court Department on July 15, 1982.

A pretrial motion was heard by *Herbert F. Travers, Jr.*, J. and the case was tried before *Chris Byron*, J.

Brian E. Concannon (*Daniel E. Kudzma* with him) for the plaintiff.

Danielle E. deBenedictis (*James B. Conroy* with her) for the defendant.

CUTTER, J. In 1981, the defendant, also plaintiff-in-counterclaim (the wife), and Rainer Schinabeck had been married for some years. The wife sought a divorce from Schinabeck in Switzerland, where the couple owned a house. In 1982, Schinabeck sold the Swiss house, and the wife and the couple's two children were evicted (in a manner at least inconsiderate). The wife and the children later returned to Scituate, Massachusetts, to a house there[1] which in past years had been owned by Schinabeck and the wife as tenants by the entirety. She filed a complaint for divorce in the Probate Court, Plymouth County, on July 23, 1982.

Schinabeck was president of American Velodur Metal, Inc. (AVM), a family business. For a time prior to 1981, part of the Scituate premises was used as an office for AVM.[2] On November 3, 1981, Schinabeck purported to revoke the trust, with the consequence, at least by the terms of the trust, that he would have gained title to the Scituate premises. On August 30, 1982, Schinabeck purported to convey the Scituate prem-

[1] The Scituate premises consisted of seven acres of land with a main house, a multiple vehicle garage, a pool, two small cottages, and a separate small house. The premises had been acquired in 1968 and used as the marital home. The Schinabeck family traveled back and forth between the Scituate house and the Swiss house. In June, 1977, at Schinabeck's request, the premises had been conveyed by him and the wife to themselves as trustees of a trust (the N & R Realty Trust) for the benefit of the wife and the couple's two children, revocable by Schinabeck alone (defined in the trust as the "settlor" although both he and his wife were trustees and both had owned the premises by the entirety) on a basis, potentially deceptive, by which he alone, on revocation, would become the owner of the premises.

[2] In January, 1981, Schinabeck as trustee purported to lease the Scituate premises to AVM, then represented by Schinabeck as its president. That lease by its terms expired December 31, 1981, and the record does not disclose that it was renewed, although the lease purported to permit annual renewals at the option of AVM.

ises to AVM for $150,000. In part at least because of the town zoning board's denial of a variance, AVM's business was moved elsewhere.

On July 15, 1982, AVM filed a complaint in the Superior Court claiming the right to exclusive possession of the Scituate premises under the lease and seeking to enjoin the wife from using the Scituate premises. A hearing on a restraining order was set for July 22, 1982. Before that hearing the wife and AVM entered into a stipulation, which essentially separated the Scituate premises into two parts, so that (for the time being at least) the wife would have control of the main house and pool and certain access routes, and AVM would have control of the balance of the premises.

AVM's complaint was amended on September 30, 1983, and the wife's answer to that complaint and her amended counterclaim were filed on November 4, 1983. The complaint set out the substance of the transactions affecting the Scituate premises already mentioned (and see note 1, *supra*) and sought to enjoin the wife from using all or most of the premises. The wife's answer admitted the existence of the various documents already mentioned but disputed their validity. The answer and her counterclaim alleged (a) the existence of the Swiss and Plymouth County divorce proceedings; (b) that the present complaint had been brought by AVM to coerce the wife to "settle the divorce action [a separate lawsuit] on terms . . . favorable to" Schinabeck (as an improper use of court process); (c) that the wife had "suffered emotional, physical, and financial damage"; (d) that the transactions relating to the Scituate premises were carried out (with AVM's actual or constructive knowledge) to hinder the wife in recovering her fair share of property in the divorce proceedings; and (e) that the transactions were fraudulent under G. L. c. 109A. The counterclaim also asserted that, at all relevant times, AVM was wholly owned by Schinabeck, that he has been its president, a director, and stockholder, and that he is the beneficial owner of its stock.

The wife, with her original answer to the unamended complaint, gave notice of intention to take Schinabeck's deposition on October 5, 1982. His counsel notified the wife's counsel

on that morning that Schinabeck would not be available for a deposition. As a consequence of a hearing before a Superior Court judge (Judge A), no action was taken then upon the wife's motion to compel discovery and for sanctions for Schinabeck's failure to appear. Notice, however, was given by the wife's counsel of intention to take the depositions of various officers and employees of AVM in an attempt to establish the then existing relationship between Schinabeck and AVM.

As a consequence of three such depositions (which gave strong indication that Schinabeck was still the controlling force behind AVM), the wife renewed on November 22, 1982, her attempt to obtain an order compelling AVM to produce Schinabeck for a deposition and for sanctions in the event that he should not appear. An order was issued, after hearing on December 17, 1982, before another Superior Court judge (Judge B), for a writ of protection against service of process on Schinabeck in the divorce proceeding while in Massachusetts to give depositions.[3] In the writ of protection it was stated that Schinabeck's deposition was to take place on or before February 7, 1983.

On April 20, 1983, a further motion by the wife for sanctions for AVM's failure to produce Schinabeck for a deposition (as required by Judge B's order of December 17, 1982) was allowed by Judge B "unless . . . Schinabeck is made available for a deposition within 60 days." The motion had requested that "the allegations of . . . [the wife's] first and second counterclaim . . . [be] deemed admitted."

On June 7, 1983, the wife gave notice of a deposition of Schinabeck to be taken in Boston on June 14, 1983. A motion by AVM to extend the time for producing Schinabeck for a

[3]On December 23, 1982, three or more actions were commenced by AVM in a District Court in some degree duplicating the present complaint. These were consolidated with the present complaint in the Superior Court, and AVM's motion to dismiss its own present complaint in the Superior Court was denied on February 4, 1983. From that motion it reasonably could be inferred that AVM was attempting to avoid the effect of the outstanding orders and stipulations in this case in the Superior Court.

deposition was denied on June 10, 1983, by another Superior Court judge (Judge C). On June 16, 1983, the writ of protection was extended by order of Judge C, to midnight on June 20, 1983, on motion of AVM.[4]

Judge C on June 30, 1983, after hearing, denied a motion filed on June 23, 1983 (three days after the expiration of the time specified in Judge B's order of April 20, 1983). The motion was to extend the time for compliance and to transfer the deposition to Zug, Switzerland, to be held on July 11, 1983, upon payment by Schinabeck of the travel expenses to Zug of one attorney and a stenographer. Judge C ther also ordered that the "first and second counterclaims [be] deemed admitted," pursuant to Judge B's order of April 20, 1983,[5] and that the case be placed on the jury trial list for October, 1983. The order of June 30, 1983, was based expressly on findings (among others) by Judge C that the new motion for a continuance was filed after the time limit set in the order of April 20 had expired; that no affidavit supported the new motion; and that no satisfactory proof whatsoever underlay the assertions of Schinabeck's counsel concerning the reasons for Schinabeck's failure to appear for a deposition.[6]

[4] An affidavit of associate counsel for the wife (dated June 23, 1983) asserted that the wife's attorney had been informed by counsel for AVM that Schinabeck might appear for a deposition in Boston on June 20, 1983, but that at 9:50 A.M. on that day the wife's attorney had been notified that Schinabeck "had decided not to appear." In fact he did not appear.

[5] A petition for relief under G. L. c. 231, § 118, from Judge B's order of April 20, 1983, was filed by AVM. This was denied by a single justice of this court. A somewhat similar petition was filed under § 118, from the order of June 30, 1983, entered by Judge C. A single justice of this court also denied that petition, on August 15, 1983. Petitions in this court under § 118 (Nos. 1983-0115 CV, 0215 CV, and 0384 CV), filed in the divorce proceeding, need not be discussed.

[6] Affidavits of the wife and her daughter filed August 3, 1983, indicate that, in addition to Schinabeck's persistent course of refusal to appear for depositions, AVM's employees have pursued a policy of harassment of the wife and children in the Scituate house. The wife's affidavit asserts that Schinabeck, although possessed of "vast assets, including . . . ten corporations, a private jet, many [expensive] automobiles . . . and apartments in Switzerland, London, Washington, D.C., Munich, and Florida," has failed to pay alimony and child support ordered by the Probate Court.

The case, essentially limited to a hearing on damages on the first counterclaim, alleging abuse of process,[7] was tried before another Superior Court judge (Judge D) and a jury from January 4 to 17, 1984. Judge D denied motions by AVM for a directed verdict and (after the jury had returned a verdict for Mrs. Schinabeck of $285,000) for judgment n.o.v., and for a new trial. Judgment was entered on the verdict thus returned. We consider the plaintiff's appeals on the issues (1) whether the sanctions imposed upon it were too harsh, and, in addition to the evidence matter discussed below in part 2 of this opinion, (2) whether the damages awarded upon the wife's counterclaim for abuse of process were excessive.

1. Schinabeck's course of obstructive tactics was appropriately described by Judge C (at the hearing on June 10, 1983) as a "continuing pattern of making himself unavailable for . . . deposition and . . . a conscious design on his part to avoid doing so."[8] Judge B apparently had perceived this pattern when he entered his order of April 20, 1983, giving Schinabeck sixty days in which to appear for a deposition. No affidavit had or has been filed in behalf of AVM which contradicts the affidavits and contentions of the wife and others, or that tends to negate the depositions of AVM's employees (in part called to the attention of Judge B) indicating that Schinabeck still controlled AVM. Writs of protection had been issued to prevent Schinabeck from being served with process in the Plymouth

[7] Judge D dismissed AVM's complaint and directed that the Scituate premises be treated as having been the subject of a fraudulent conveyance (G. L. c. 109A, § 10). Judge D's original intention apparently was that the Scituate premises be reconveyed by AVM to Schinabeck and the wife as tenants by the entirety. In any event, an injunction was entered on January 26, 1984, restraining AVM from transferring or encumbering any of its assets until the wife obtained full satisfaction of any judgment in this case, or until any such judgment should be set aside on appeal.

[8] This language and the whole tone of the hearing before Judge C on June 29, 1983, do not suggest to us that Judge C thought he had no power to revise Judge B's order of April 20, 1983, but rather that he, as matter of discretion, agreed with it. Any contention to the contrary, based on cases like *I.S.K. Con of New England, Inc.* v. *Boston*, 19 Mass. App. Ct. 327, 329-330 (1985), does not appear to have been raised in the Superior Court or until a supplemental brief filed in this court two days after the arguments.

County divorce action if he had come to, or been present in, Massachusetts for a deposition. No affidavit established that he was unable to attend a deposition by reason of illness or other reasons than his business travels and his own recalcitrance. Judge B gave AVM (which, on the basis of the depositions of AVM's employees, he was justified in treating as Schinabeck's controlled entity) a long enough period to produce Schinabeck. Judge C was well justified, on this record, in enforcing Judge B's perceptive order when the sixty-day period for producing Schinabeck has expired. Schinabeck's own flagrantly egregious conduct called for a serious sanction.[9]

We recognize fully that Mass.R.Civ.P. 37(b), 365 Mass. 798 (1974), and the authorities following it, and the comparable Federal rule, require that the failure to provide discovery must take place "wilfully" and that any sanction for violation of the rule be "just." See *Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707-708 (1982); *Partlow* v. *Hertz Corp.*, 370 Mass. 787, 790-791 (1976); *Litton Business Tel. Systems, Inc.* v. *Schwartz*, 13 Mass. App. Ct. 113, 116-118 (1982). See also *Levings* v. *Forbes & Wallace, Inc.*, 8 Mass. App. Ct. 498, 505 (1979); *M. Clifton Edson & Son* v. *McConnell*, 9 Mass. App. Ct. 930 (1980). Contrast *Henshaw* v. *Travelers Ins. Co.*, 377 Mass. 910, 911 (1979, where a sanction of default in the particular circumstances was deemed too severe and lesser sanctions were imposed); *Bob Berman Assocs., Inc.* v. *Gross*, 15 Mass. App. Ct. 1000, 1001 (1983, where the record showed "some tardiness" but also "indications of 'extensive efforts at compliance' "). Compare also *Arnesen* v. *Shawmut County Bank*, 504 F.Supp. 1077, 1079-1080 (1980, a case under the somewhat comparable provisions of Fed.R.Civ.P. 41 [b]).

In the present case, Schinabeck's testimony was vital to the wife's ability to establish her defenses to AVM's claims and

[9] Especially was this so in view of Schinabeck's efforts (in a form running serious risk of deception and naturally arousing suspicion, see note 1, *supra*) to have AVM gain possession of, and title to, his principal Massachusetts assets disclosed by this record, viz., the Scituate premises and the personal property there to be found.

to prove her counterclaims. From the depositions of AVM's employees already mentioned, it could be inferred by Judges B and C that Schinabeck, through his controlled entity, AVM, had been responsible for the initiation of the complaint against her. His testimony also was important in the proof of (1) a fraudulent intention in the transfers leading to placing record title to the Scituate premises in AVM, and (2) a malign purpose to use the prosecution of this complaint to exert pressure on the wife to accede to an unfair settlement of the separate divorce proceedings. Without his testimony she inevitably would suffer great prejudice. We think the harsh sanction of default on the counterclaims was justified abundantly. Judges B and C reasonably could conclude that Schinabeck's willfulness and bad faith had been demonstrated clearly. There was no abuse of discretion by either judge.

2. At the trial before Judge D, proof was appropriate of the expenses for legal fees and disbursements caused to the wife by Schinabeck's complaint. Counsel for the wife was a partner in a substantial Boston law firm. To prove the expense caused to the wife, counsel called as a witness a senior partner of that firm (who was supervising work on this litigation) to testify to the work done by partners, associates, and paralegal employees of the firm. His testimony as an expert of the fair value of the work done in connection with defending against AVM's complaint, of course, was necessarily based in part upon the records of the firm.[10] Counsel also offered in evidence computer printouts of matters reflected in (and provided from) daily diary entries of the persons who had done the work.

The wife's counsel produced the billing records for review by AVM's counsel in advance of any offer of them in evidence. The basic diary sheets were also available for examination, and an effort (dealt with by Judge D in bench or lobby confer-

[10] His testimony, as an expert, was that the legal services in defending against AVM's complaint were reasonably worth $75,000 and, based upon time charges alone, had a value of more than $50,000 with, in addition to each value, disbursements agreed to be $4,500. See as to the permissible introduction of the basis for an expert's opinion, *Simon* v. *Solomon*, 385 Mass. 91, 105-106 (1982).

ences) was made to segregate from all the time expended by the law firm on a variety of matters for the wife (e.g., the divorce proceeding, the counterclaims, and the three District Court cases consolidated with this case, note 3, *supra*) the time spent only in the defense of AVM's complaint. Judge D had ruled that only the fees and disbursements with respect to the wife's defense of AVM's complaint were admissible to prove damages recoverable in this action. After a comprehensive review of the billing records and a voir dire examination of the witness (the supervising partner), the billing records were received as an exhibit.[11]

Judge D obviously recognized, as we do, that there was not strict compliance with G. L. c. 233, § 78, in that the records, in part at least, were prepared after this complaint was filed. See *DiMarzo* v. *American Mut. Ins. Co.*, 389 Mass. 85, 105-106 (1983). No reason, however, was advanced for doubting the reliability of the records as representing the time reported by a significant number of persons as spent on the wife's defense of this case. Where, as here, the records had been found to have been made in good faith, in the regular course of the practice of law, and could have been found to be reliable, the evidence would have been admitted under Proposed Mass.R.Evid. 803(6), and under the precisely comparable Fed.R.Evid. 803(6). The Supreme Judicial Court, in refusing in 1982 to adopt the then proposed rules, encouraged the bar to cite those rules where pertinent. That court in *Commonwealth*

[11] Judge D made express findings that the law firm's "records were made in good faith, in the regular course of business," but were not "made before the beginning of this . . . proceeding." He further found that if there had "been a separate suit [for abuse of process] rather than a counterclaim . . . those records would [and could] have been made before that second . . . proceeding" and would have been admissible. He then ruled that the wife ought not "to be penalized . . . [in] submitting that evidence [the records] merely because she brought a counterclaim rather than waiting to file a separate suit," where the regular course of business of the law firm was to make computer entries from the daily diary of each person who performed services at the time (or shortly after) such services were performed. We recognize that each such person could have been summoned to testify about the records submitted by them, respectively, but this would have been a wasteful, time-consuming process.

v. *Meech*, 380 Mass. 490, 496-497 (1980), made note that it did "not regard the common law hearsay exceptions as frozen in their established contours," and that the court had "been prepared on suitable occasions to venture forth." See *Commonwealth* v. *White*, 370 Mass. 703, 713 (1976, where it was said that "the hearsay rule and its stated exceptions should not be regarded as a closed system without room for variations in particular cases on reasoned grounds"); Liacos, Massachusetts Evidence, 266, 328-338 (5th ed. 1981 & Supp. 1985). See also *Dyecraftsmen, Inc.* v. *Feinberg*, 359 Mass. 485, 487 (1971, transcription of records present in the courtroom admitted in the discretion of the judge as matter of convenience); *Commonwealth* v. *Hogan*, 7 Mass. App. Ct. 236, 251-252; *S.C.* 379 Mass. 190 (1979, printout of computer records stored before but written out after the beginning of the litigation). Contrast *Wingate* v. *Emery Air Freight Corp.*, 385 Mass. 402, 405-408 (1982, employer's report of an injury not a business record of workers' compensation insurer, but see concurring opinion at 409-410). As to recovery of counsel fees in appropriate instances, compare *Chartrand* v. *Riley*, 354 Mass. 242, 244 (1968), and *M.F. Roach Co.* v. *Provincetown*, 355 Mass. 731, 732-733 (1969).

We conclude, giving consideration to all the circumstances, that Judge D reasonably admitted the computer records relating to the time expended. We perceive no respect in which the admission of the records was unfairly prejudicial in any practical sense. Judge D's patient efforts to ensure the reliability and appropriate content of the records, and his ruling finally admitting them, represented a sound, practical administration of this trial.

3. AVM contends that Judge D should not have denied its motion for a directed verdict, made at the close of the wife's evidence on her counterclaim, because the wife had not made out a case of abuse of process. We recognize that, even after a default, a court may consider whether a legitimate cause of action has been alleged and admitted. *Productora e Importadora de Papel, S.A. de C.V.* v. *Fleming*, 376 Mass. 826, 833-835 (1978). The wife, however, in her counterclaim adequately

alleged that "(1) 'process' was used [by AVM]; (2) for an ulterior . . . purpose [to influence the divorce settlement by coercion]; (3) resulting in damage." *Jones* v. *Brockton Pub. Mkts., Inc.*, 369 Mass. 387, 389 (1975). See *Malone* v. *Belcher*, 216 Mass. 209, 211-213 (1913); Prosser & Keeton, Torts, § 121 (5th ed. 1984). The evidence presented supported the allegations. There was ample evidence of damage. The motion could not have been granted. *Alholm* v. *Wareham*, 371 Mass. 621, 627 (1976). Compare, as to the presence of an ulterior purpose in bringing the action, *Cohen* v. *Hurley, ante* 439, 442-443 (1985).

There also was no error in Judge D's denial of AVM's motions for a new trial and for judgment n.o.v. So far as those motions were based on the contention that the damages assessed by the jury were excessive, there was sufficient evidence that damages had been caused to the wife in the form of (a) mental suffering and distress, harassment by AVM, and much inconvenience, all recoverable, if caused by the alleged abuse of process; (b) the necessity of incurring counsel fees to defend against the claim (see note 10, *supra*); and (c) at least the expenditure of the wife's time in many consultations with counsel about the defense.

This is not a case of recovery for the tort of intentional infliction of emotional distress as in *Agis* v. *Howard Johnson Co.*, 371 Mass. 140 (1976), or of negligent causing of such distress. See *Payton* v. *Abbott Labs*, 386 Mass. 540 (1982). Recovery has been allowed in Massachusetts for wrongful use of process including "injury to . . . the feelings of the injured person." *Titcomb* v. *Bay State Grocery Co.*, 254 Mass. 599, 601 (1926). See *Malone* v. *Belcher*, 216 Mass. at 211-212. There seems to us to be a clear distinction between (a) mental and emotional distress caused by the commission of an independent and separate tort recognized at common law, and (b) distress constituting the separate tort recognized fairly recently in the *Agis* case, 371 Mass. at 142-146, and the tort discussed in the *Payton* case, 386 Mass. at 548-557. See the thorough opinion in *George* v. *Jordan Marsh Co.*, 359 Mass. 244, 249-256 (1971). We are not prepared to say that Judge D

abused his discretion by denying a new trial or, in the alternative, refusing to order a remittitur in this matter involving unliquidated damages. See *Freeman* v. *Wood*, 379 Mass. 777, 781 n.9 (1980).[12]

4. The judgment appealed from, with respect to damages upon the wife's counterclaim for abuse of process, is affirmed. The present record does not clearly indicate (see note 7, *supra*) whether further action (including the entry of judgment) is appropriate upon the wife's claim, deemed admitted, for the alleged fraudulent conveyance of the Scituate premises. With respect to that counterclaim, the case is remanded to the Superior Court for any further proceedings which may be appropriate.

So ordered.

[12]There is no merit to a contention by AVM that the verdict should be set aside because the wife's trial counsel kept a large number of files containing basic documents in this case at or near her place in the courtroom without offering them in evidence. This matter was noted (during a bench conference) by Judge D with disapproval because of its possible effect on the jury as to the amount of material involved in the case. AVM, however, made no objection to the presence of the material. No request for instructions concerning this pile of documents was made by AVM. Any unfortunate effect of the presence of the documents was neutralized adequately by the judge's instructions that the jury's verdict must be based upon the facts proved in testimony and by exhibits.